

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MALIK JONES,

Plaintiff,

v.

L. WASHINGTON, et al.,

Defendants.

No. C 09-3003 CW

ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS; DENYING B.
BROWN'S MOTION TO
DISMISS AS MOOT; DENYING
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTIVE
RELIEF AND LEAVE TO FILE
SUPPLEMENTAL COMPLAINT

(Docket Nos. 38, 76, 78)

INTRODUCTION

Plaintiff Malik Jones, a state prisoner proceeding pro se and in forma pauperis, brings an action under 42 U.S.C. section 1983, alleging that Defendants L. Washington, D. Lang, B. Brown, E. Contreras, and E. Ramirez violated his Eighth Amendment rights. Defendants now make an unenumerated Rule 12(b) motion to dismiss the complaint for failure to exhaust administrative remedies under the Prison Litigation Reform Act (PLRA). In the alternative, Defendants move for summary judgment under Rule 56(c). The motions were taken under submission on the papers. Having considered all of the papers filed by the parties, the Court GRANTS Defendants' motion to dismiss. Because the Court grants the motion to dismiss, Defendants' motion for summary judgment is denied as moot. Defendant B. Brown moves separately to dismiss the Second Amended Complaint for failure to state a claim and collateral estoppel. The Court DENIES this motion as moot.

1 Plaintiff moves for injunctive relief and leave to file a
2 supplemental complaint. The Court DENIES these motions.

3 BACKGROUND

4 Plaintiff is a prisoner at High Desert State Prison (HDSP)
5 and was formerly incarcerated at Salinas Valley State Prison
6 (SVSP). He complains of excessive force and deliberate
7 indifference to his medical needs during his transfer from SVSP to
8 HDSP. Defendant Washington is a transportation sergeant at SVSP
9 and the other Defendants are all transportation officers. The
10 complaint alleges that on July 7, 2006, Defendants assaulted
11 Plaintiff, who is wheelchair bound, and were indifferent to his
12 medical needs during the transfer between prisons.

13 Plaintiff alleges that Defendant Lang attempted to break his
14 thumb and that Defendants Washington, Lang, and Brown¹ attempted
15 to break his wrist. Compl. ¶¶ 42, 59. He further alleges that
16 Defendants Washington, Lang, Contreras and Brown threw him on the
17 ground, "causing more pain and injury to [his] head." Id. ¶ 59.
18 The complaint asserts that Defendant Lang used a car door
19 repeatedly to slam Plaintiff's knees, and that an unnamed officer
20 slammed the car door so that it would hit Plaintiff in the head.
21 Id. ¶¶ 47, 48. Plaintiff claims that Defendants Lang and Brown
22 forcibly made Plaintiff swallow a liquid substance while they
23 laughed at him. Id. ¶ 50.

24 On July 26, 2006, Plaintiff claims, he mailed a CDC 602
25 Inmate/Parolee Appeal Form log no. SVSP C-06-02436 to Warden Evans
26

27 ¹ References to Jane Doe or P. Brown have been substituted with
28 Defendant B. Brown.

1 at SVSP, alleging that Defendants had assaulted him during the
2 transfer between prisons. Medina Dec. Supp. Defs.' Mot. (Medina
3 Dec.) Ex. B. SVSP C-06-02436 was marked denied at the first
4 formal level of review and returned to Plaintiff. The screening
5 form attached to SVSP C-06-02436 stated that Plaintiff's appeal
6 was being returned to him because "time constraints were not met."
7 Id. The bottom of the Inmate/Parolee Appeal Screening Form sent
8 to Plaintiff contained the following message: "This screening
9 action may not be appealed. If you allege the above reason is
10 inaccurate, then attach an explanation on a separate piece of
11 paper." Id. Plaintiff never submitted an explanation. Instead
12 he filed two more Form 602 appeals, which were screened as
13 untimely and duplicative, respectively.

14 PROCEDURAL HISTORY

15 On September 19, 2008, the Court found cognizable Plaintiff's
16 Eighth Amendment claims for excessive force and deliberate
17 indifference to his serious medical needs against Defendants
18 Washington, Lang, Contreras and Doe. The Court later granted
19 Plaintiff's motion to amend the complaint to substitute Defendant
20 P. Brown for Defendant Doe.

21 On July 22, 2009, Plaintiff filed a Second Amended Complaint
22 (2AC)(docket No. 62) which the Court deemed to be a motion for
23 leave to amend. The Court found that the 2AC raised cognizable
24 claims against Defendant Ramirez with respect to the events in the
25 instant case, and granted leave to amend to add claims against
26 him. (Docket No. 61.) In that Order the Court also dismissed the
27 claims against P. Brown and substituted B. Brown as a defendant in
28 her stead. (Docket No. 61.) The Court denied leave to amend to

1 add new claims unrelated to these events. (Docket No. 61.)
2 Defendant Ramirez was never served.

3 Before the Court is Defendants' motion to dismiss all claims
4 for failure to exhaust administrative remedies, and their motion
5 for summary judgment under Federal Rule of Civil Procedure 56(c).
6 (Docket No. 38.) Plaintiff filed an opposition, and Defendants
7 replied. Also before the Court is Defendant B. Brown's motion to
8 dismiss the 2AC for failure to state a claim and collateral
9 estoppel. (Docket No. 78.) Plaintiff has filed no opposition and
10 the deadline has passed.

11 On June 22, 2011, Plaintiff filed a document entitled "motion
12 of imminent danger" requesting injunctive relief and leave to file
13 a supplemental complaint. (Docket no. 76.) Defendants have
14 opposed Plaintiff's motion and Plaintiff has replied to their
15 opposition.

16 I. Failure to Exhaust Administrative Remedies

17 A. Legal Standard

18 The PLRA provides that "[n]o action shall be brought with
19 respect to prison conditions under [42 U.S.C. § 1983], or any
20 other Federal law, by a prisoner confined in any jail, prison, or
21 other correctional facility until such administrative remedies as
22 are available are exhausted." 42 U.S.C. § 1997e(a). The PLRA
23 exhaustion requirement is mandatory and not subject to the
24 discretion of the court. Booth v. Churner, 532 U.S. 731, 739
25 (2001).

26 The PLRA requires "proper exhaustion" of administrative
27 remedies. Woodford v. Ngo, 548 U.S. 81, 93 (2006). To meet this
28 exacting standard, prisoners must not only lodge a formal

1 complaint, but also pursue it through each stage of the
2 administrative process in "compliance with an agency's deadlines
3 and other critical procedural rules." Woodford, 548 U.S. at 93.
4 The requirement cannot be satisfied "by filing an untimely or
5 otherwise procedurally defective administrative grievance or
6 appeal." Id. A prisoner must exhaust claims before filing a suit
7 in federal court even though the administrative process may not be
8 "plain, speedy and effective." Porter v. Nussle, 534 U.S. 516,
9 524 (2002). A complaint must be dismissed if the prisoner did not
10 exhaust all available administrative remedies before the suit was
11 filed. Booth, 532 U.S. at 738; McKinney v. Carey, 311 F.3d 1198,
12 1199 (9th Cir. 2002).

13 State prison regulations define the contours of proper
14 exhaustion. Jones v. Bock, 549 U.S. 199, 218 (2007). Under
15 California law, inmates have a right to an administrative appeal
16 of "any departmental decision, action, condition, or policy which
17 they can demonstrate as having an adverse effect upon their
18 welfare." Cal. Code Regs. tit. 15, § 3084.1(a)(2006).² Inmates
19 also have a right to file administrative appeals alleging
20 misconduct by correctional officers. Cal. Code Regs. tit. §
21 3084.1(e).

22 To exhaust all available administrative remedies, a prisoner
23 in California must complete a Form 602 and proceed through four
24 levels of appeal: (1) informal level grievance filed directly with
25

26 ² Article 8, § 3084 of the California Code of Regulations has been
27 amended nearly a dozen times, most recently in 2006, 2010 and
28 2011. Because Plaintiff filed his grievance in 2009, this Order
cites sections of the 2006 code unless otherwise noted.

1 any correctional staff member; (2) first formal level appeal filed
2 with one of the institution's appeal coordinators; (3) second
3 formal level appeal filed with the institution head or designee;
4 and (4) third formal level appeal filed with the CDCR director or
5 designee. Cal. Code Regs. tit. 15 § 3084.7;³ Brodheim v. Cry, 584
6 F.3d 1262, 1264-65 (9th Cir. 2009); Barry v. Ratelle, 985 F. Supp.
7 1235, 1237 (S.D. Cal. 1997). At the time of Plaintiff's appeal a
8 prisoner was required to submit the initial appeal within fifteen
9 working days "of the event or decision being appealed" and
10 resubmit the appeal to each level of review within fifteen working
11 days of receiving a denial from the previous level. Cal. Code
12 Regs. tit. 15 § 3084.6(c);⁴ Sapp v. Kimbrell, 623 F.3d 813, 818
13 (9th Cir. 2010). Once an appeal is denied at the third formal
14 level, the prisoner has exhausted his administrative remedies
15 under the PLRA. Barry, 985 F. Supp. at 1237-38.

16 Non-exhaustion is an affirmative defense which should be
17 brought by the defendants in an unenumerated motion to dismiss
18 under Federal Rule of Civil Procedure 12(b). Wyatt, 315 F.3d at
19 1119. In deciding such a motion, the court may look beyond the
20 pleadings and decide disputed issues of fact. Id. at 1119-20.

21 B. Analysis

22 In support of the motion to dismiss Defendants provide the
23 declaration of E. Medina, the appeals coordinator at SVSP.

24 _____
25 ³ In 2006 the relevant California Code of Regulations section
26 number was 3084.5. As of July 2011 the applicable section number
is 3084.7.

27 ⁴ As of July 2011 the applicable section number is 3084.8 and
28 provides thirty calendar days for inmates to file appeals.

(Docket No. 45.) Medina conducted a computerized search of the institutional appeals database for inmate appeals submitted by Plaintiff and for the appeal responses. He states in his declaration that SVSP-C-06-2426 is the only appeal filed by Plaintiff in 2006 classified as a staff complaint and it alleges excessive use of force by Defendants during the transport between SVSP and HDSP on July 7, 2006. Medina Dec. ¶ 9. Medina asserts that this appeal was received by the SVSP appeals coordinator on August 8, 2006, eighteen working days after the incident, and was therefore screened out for failure to meet time constraints. Id. ¶ 13.⁵

Plaintiff argues that prison officials deliberately interfered with his grievance by screening the initial appeal as untimely even though he submitted it within fifteen working days, and thus prevented him from exhausting his appeals. Pl.'s Response, at 8. If prison officials improperly screen out an inmate's appeals, the inmate cannot properly complete the grievance process, and administrative remedies are unavailable. Sapp, 623 F.3d at 822-23. To satisfy this exception to exhaustion, an inmate must show "(1) that he actually filed a grievance or grievances that, if pursued through all levels of administrative appeals, would have sufficed to exhaust the claim that he seeks to pursue in federal court, and (2) that prison officials screened his grievance or grievances for reasons

⁵ Appeal No. SVSP-C-06-02436 was stamped "received" twice, once on August 2, 2006 and once on August 8, 2006. August 2, 2006, the earlier date, was actually eighteen working days after the incident.

1 inconsistent with or unsupported by applicable regulations."
2 Sapp, 623 F.3d at 823-824.

3 Plaintiff contends that he submitted SVSP-C-06-02436 timely
4 when he mailed it to Warden Evans at SVSP on July 26, 2006. He
5 cites Houston v. Lack, 487 U.S. 266, 270 (1988) for the argument
6 that SVSP-C-06-02436 should have been deemed filed at the time he
7 gave it to prison authorities for mailing. Plaintiff offers, and
8 the Court knows of, no authority to extend the application of
9 Houston beyond court filings to include the mailing of internal
10 prison grievances.

11 Both the screening form that was returned to Plaintiff, and
12 the regulations in effect at the time, require that appeals be
13 sent to the appeals coordinator within fifteen days of the
14 incident. Medina Dec., Ex. B; Cal. Code Regs. tit. 15,
15 § 3084.2(c)(2006). Plaintiff did not comply with the applicable
16 requirements when he sent his appeal directly to Warden Evans
17 rather than mailing or submitting it to an appeals coordinator.
18 There is nothing to contradict Defendants' contention that the
19 appeal was sent to the appeals coordinator after the fifteen day
20 limit had expired.

21 Moreover, the screening document included an instruction to
22 Plaintiff to write an explanation if he did not feel that the
23 reason given for screening the complaint was accurate. Medina
24 Dec., Ex. B. While Plaintiff wrote on a subsequent Form 602 that
25 the denial of his appeal as untimely showed "blatant biasness
26 (sic) toward my appeal," he never claims to have submitted the
27 appeal timely. The record shows no explanation of how prison
28 authorities exhibited bias towards his appeal or why his appeal

1 should not have been screened as untimely. Compl. Attach. 6.
2 Because SVSP-C-06-02436 was properly screened and Plaintiff had
3 further remedies available, he is not entitled to an exception to
4 the exhaustion requirement.⁶

5 C. Unserved Defendant

6 To date Defendant Ramirez has not been served. Nonetheless,
7 it is clear that the claims against Defendant Ramirez are subject
8 to dismissal for the reasons discussed above. Plaintiff alleges
9 that Defendant Ramirez aided and abetted the other Defendants in
10 their alleged use of excessive force and deliberate indifference
11 to Plaintiff's medical needs during the transfer from SVSP to
12 HDSP. There is no suggestion in the complaint and exhibits
13 attached thereto, or in the briefs and exhibits filed in
14 connection with the instant motion to dismiss, that the Court's
15 analysis as to non-exhaustion with respect to the claims against
16 Defendant Ramirez would differ in any respect from the Court's
17 analysis with respect to the other Defendants.

18 Accordingly, the Court dismisses the claim against Defendant
19 Ramirez as unexhausted. See Abagninin v. AMVAC Chemical Corp.,
20 545 F.3d 733, 742 (9th Cir. 2008) (holding district court properly
21 granted motion for judgment on pleadings as to unserved defendants
22 where such defendants were in position similar to served
23 defendants against whom claim for relief could not be stated);
24 Columbia Steel Fabricators, Inc. v. Ahlstrom Recovery, 44 F.3d

25 ⁶ Plaintiff's appeal was screened for reasons consistent with and
26 supported by applicable regulations. However, while SVSP-C-06-
27 02436 did include allegations of excessive force, there were no
28 facts alleged therein that would have exhausted the claims of
deliberate indifference to medical needs.

1 800, 803 (9th Cir. 1995)(affirming grant of summary judgment in
2 favor of non-appearing defendant where plaintiff, in response to
3 summary judgment motion filed by appearing defendant, had "full
4 and fair opportunity to brief and present evidence" on dispositive
5 issue as to claim against non-appearing defendant).

6 II. Defendant B. Brown's Motion to Dismiss the Second
7 Amended Complaint.

8 In its Order of March 31, 2011, the Court deemed the document
9 entitled Seconded Amended Complaint (docket no. 36) to be a motion
10 for leave to file a second amended complaint. (Docket No. 61.)
11 Leave to amend was granted to substitute B. Brown for P. Brown.
12 The Court denied leave to amend with respect to new claims raised
13 in the 2AC. Defendant B. Brown has filed a separate motion to
14 dismiss the 2AC for failure to state a claim and on the grounds of
15 collateral estoppel. (Docket No. 78.)

16 Because the Court ordered that Defendant B. Brown be
17 substituted in the original complaint, the operative claims
18 against her are those listed therein. (Docket no. 1). Plaintiff
19 was not granted leave to file the additional claims alleged in the
20 2AC. (Docket No. 61). Defendant B. Brown joins the motion to
21 dismiss the original complaint. (Docket No. 38). Defendant B.
22 Brown's motion to dismiss the 2AC is denied as moot.

23 III. Subsequent Motions

24 Plaintiff has filed a motion requesting injunctive relief and
25 leave to file a supplemental complaint. (Docket No. 76.) In his
26 moving papers and attached declaration, Plaintiff states that Dr.
27 Bright and other SVSP prison officials have, in retaliation for
28 Plaintiff's filing of prison grievances and litigation, denied

1 Plaintiff access to his wheelchair. In particular, he maintains
2 that Dr. Bright falsified the results of Plaintiff's medical
3 examination and claimed he had a videotape of Plaintiff walking to
4 the dining hall and in the yard without a wheelchair. As a
5 result, Plaintiff maintains, he is unable to get to the dining
6 hall to eat and, consequently, he has had to rely on eating
7 garbage and has stopped taking two of his "psych" medications.
8 Plaintiff further asserts that, since May 2011, he has been denied
9 access to documents in his medical file and has not received
10 responses to his administrative appeals on the matter. (Docket
11 Nos. 76, 77.)

12 By way of his motion, Plaintiff asks the Court for the
13 following relief: 1) order "Bright/SVSP Officials" to produce a
14 copy of the videotape of Plaintiff walking without his wheelchair
15 to the individual who has power of attorney over Plaintiff's
16 healthcare and/or his personal physician; 2) order "Bright/SVSP
17 Officials" to produce a document showing that the individual who
18 has power of attorney over Plaintiff's healthcare and/or his
19 personal physician authorized the seizure of his wheelchair;
20 3) order "Bright/SVSP Officials" to return Plaintiff's wheelchair
21 immediately; and 4) grant Plaintiff leave to file a supplemental
22 complaint. Pl.'s Mot. at 3:14-25.

23 A. Supplemental Complaint

24 The court may permit a party to serve supplemental pleadings
25 "setting forth transactions or occurrences or events which have
26 happened since the date of the pleading sought to be
27 supplemented." Fed. R. Civ. P. 15(d). The power to allow
28 supplemental pleadings is discretionary, to be exercised "upon

1 such terms as are just." Id. While leave to permit supplemental
2 pleadings is favored, it cannot be used to introduce a separate,
3 distinct and new cause of action. See Planned Parenthood of So.
4 Arizona v. Neely, 130 F.3d 400, 402 (9th Cir. 1997). Matters
5 newly alleged in a supplemental complaint must have some relation
6 to the claim set forth in the original pleading. See Keith v.
7 Volpe, 858 F.2d 467, 474 (9th Cir. 1988).

8 Here, Plaintiff's motion for leave to file a supplemental
9 complaint is based on allegations concerning the actions of
10 medical personnel and prison officials at SVSP with respect to
11 Plaintiff's use of his wheelchair. None of the allegations relate
12 to the claims at issue in the present case.

13 Accordingly, leave to file a supplemental complaint is
14 DENIED.

15 B. Preliminary Injunctive Relief

16 Defendants argue that Plaintiff's motion for injunctive
17 relief relating to his wheelchair is barred by a pending class
18 action in this Court, Armstrong v. Brown, No. C 94-2307 CW, a
19 class action lawsuit brought by California state prison inmates
20 against the California Department of Corrections and
21 Rehabilitation (CDCR) for violating Title II of the Americans with
22 Disabilities Act and Section 504 of the Rehabilitation Act. A
23 consent decree was entered by this Court in Armstrong, directing
24 Defendants therein to provide certain accommodations to the class.
25 See Armstrong v. Wilson, 124 F.3d 1019, 1020 (9th Cir. 1997).

26 As of October 26, 2009, Plaintiff was classified under the
27 Disability Placement Program (DPP) as mobility impaired in
28 accordance with the Remedial Plan in Armstrong, which meant he was

1 prescribed a walker, not a wheelchair. Esparza Dec. Supp. Defs.'
2 Opp'n to Pl.'s Mot. (Esparza Dec.) ¶¶ 5-6 & Ex. B. According to
3 Defendants, on March 10, 2010, Plaintiff was evaluated by medical
4 staff for DPP Verification and, following the medical evaluation,
5 Plaintiff was removed from the DPP. Esparza Dec. ¶¶ 2-3 & Ex. A.
6 Inmates at SVSP who are not approved for a health care appliance
7 are not allowed to have such appliances in their possession,
8 custody or control. Esparza Dec. ¶ 5.

9 Defendants argue Plaintiff's request for injunctive relief is
10 barred by Armstrong because Plaintiff claims he is mobility
11 impaired and seeks, in essence, review of the decisions of prison
12 officials and medical personnel classifying him as mobility
13 impaired and then, subsequently, removing him from the DPP.
14 Plaintiff has not offered any argument to counter the one made by
15 Defendants.

16 Here, where Plaintiff is seeking relief for injuries
17 unrelated to the claims in the instant case, he must pursue relief
18 either under the terms of the Armstrong decree, if appropriate, or
19 by filing a new and separate action after he has exhausted
20 administrative remedies. Accordingly, Plaintiff's request for
21 injunctive relief is DENIED.

22 CONCLUSION

23 For the foregoing reasons, the Court orders as follows:
24 1) the motion to dismiss the complaint (docket no. 38) is GRANTED;
25 2) Defendant B. Brown's motion to dismiss the 2AC (docket no. 78)
26 is DENIED as moot; 3) Plaintiff's motion to file a supplemental
27 complaint (docket no. 76) is DENIED; and 4) Plaintiff's motion for
28 injunctive relief (docket no.76) is DENIED.

1 The Clerk of the Court shall enter judgment and close the
2 file. The parties shall bear their own costs.

3
4 IT IS SO ORDERED.

5
6
7
8 Dated: 9/23/2011


CLAUDIA WILKEN
United States District Judge

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California